Supreme Court, U.S.
FILED
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(2)

No. 03-1317

IN THE

Supreme Court of the United States

SHIRISH WAGH,

Petitioner,

v.

METRIS DIRECT, INC.; METRIS DIRECT SERVICES, INC.; METRIS COMPANIES INC.; DIRECTALERT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Ninth Circuit's observation that the doctrine of res judicata would bar the petitioner from reasserting his dismissed RICO claims in state court warrant the grant of certiorari?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondents state that Metris Companies Inc. has no parent corporation, and there are no publicly held corporations that own 10% or more of the stock of Metris Companies Inc. Respondent Metris Companies Inc. is a publicly held corporation and it owns 100% of the stock of respondent Metris Direct, Inc. Respondent Metris Direct, Inc. owns 100% of the stock of respondent Metris Direct Services, Inc.

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INTRODUCTION

The Ninth Circuit Court of Appeals affirmed the district court's dismissal with prejudice of the RICO claims asserted by petitioner Shirish Wagh ("Wagh"). Wagh does not challenge this holding. The Ninth Circuit also stated that the district court's dismissal bars Wagh from reasserting those same RICO claims in a subsequent state court action. Wagh incorrectly asserts that this statement by the Ninth Circuit is the "holding" of the decision, and that it "conflicts in principle" with this Court's decision in *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

There is no conflict between *Semtek* and the opinion below. *Semtek* held only that the claim-preclusive effect of a federal judgment dismissing a state law claim on statute-of-limitations grounds is determined by the law of the state in which the federal court sits. *Id.* at 508. The decision in *Semtek* did not alter this Court's earlier decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (a district court's dismissal of federal claims under Rule 12(b)(6) is a judgment on the merits entitled to claim-preclusive effect), or its decision in *Stoll v. Gottlieb*, 305 U.S. 165 (1938) (a federal court's adjudication of a right under federal law is entitled to claim-preclusive effect in state courts).

The Ninth Circuit's observation about the claim-preclusive effect of the district court's dismissal of Wagh's RICO claims was entirely consistent with this Court's prior opinions, including *Semtek*, *Moitie*, and *Stoll*. The alleged differences in California state court pleading requirements for RICO claims cannot alter the preclusive effect of the district court's judgment. Accordingly, since Wagh has identified no valid basis for this Court to issue a writ of certiorari, his petition should be denied.

STATEMENT OF THE CASE

Wagh originally filed this action in the Superior Court of California, County of San Francisco, alleging that respondents Metris Direct, Inc., Metris Direct Services, Inc., Metris Companies Inc. and DirectAlert (collectively "respondents" or "Metris") had caused his credit card to be billed $119.95 for a credit monitoring service that he allegedly had not ordered. Petitioner's Appendix ("App.") 4. After the San Francisco Superior Court sustained respondents' demurrer to the fraud claim (*id.*), Wagh filed a first amended complaint which purported to allege, *inter alia*, a violation of Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. App. 4-5.

Based upon the presence of a purported RICO claim, Metris removed the action to the United States District Court, Northern District of California, pursuant to 28 U.S.C. § 1441(b). App. 5. When the district court subsequently directed Wagh to file a RICO case statement pursuant to the court's Standing Order, Wagh asserted that he had stated claims under 18 U.S.C. §§ 1962(a), (b), (c), and (d). *Id.* Metris filed a response to Wagh's RICO case statement, which the district court elected to treat as a motion to dismiss. App. 6. Following a hearing, the court dismissed Wagh's section 1962(a) and (b) claims with prejudice, but granted Wagh leave to amend his section 1962(c) and (d) claims. *Id.*

Wagh filed a second amended complaint containing section 1962(c) and (d) claims, and Metris filed a motion to dismiss. *Id.* On February 20, 2002, after a hearing, the district court issued an order dismissing Wagh's section 1962(c) and 1962(d) claims with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* The court declined to exercise

supplemental jurisdiction over Wagh's remaining state law claims and remanded them to the San Francisco Superior Court. App. 6-7; *Wagh v. Metris Direct, Inc.*, 2002 WL 257846 (N.D. Cal., Feb. 20, 2002).

Wagh appealed to the Ninth Circuit Court of Appeals, and in an order dated November 7, 2003, that court affirmed the dismissal with prejudice of the RICO claims. App. 20-37; *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102 (9th Cir. 2003). Wagh sought rehearing, but the Ninth Circuit denied his petition for rehearing and issued an order which made minor changes to portions of its earlier opinion. App. 2-3; *Wagh v. Metris Direct, Inc.*, 352 F.3d 1187 (9th Cir. 2003).

REASONS FOR DENYING THE PETITION

1. The Ninth Circuit Correctly Observed That The Judgment Dismissing Wagh's RICO Claims Under Rule 12(b)(6) Of The Federal Rules Of Civil Procedure Is Entitled To Claim-Preclusive Effect

The Ninth Circuit affirmed the district court's judgment dismissing each of Wagh's RICO claims with prejudice for failure to state a claim upon which relief can be granted. App. 11-18. In his petition to this Court, Wagh challenges only the passage from the Ninth Circuit's opinion where it correctly observed that "res judicata bars Wagh from reasserting his RICO claims in state court." *Id.* 18-19. This statement is entirely consistent with well-settled principles of res judicata. There is no conflict with the decisions of this Court or those of other circuits, and therefore no basis exists for this Court to issue a writ of certiorari.

Wagh's petition ignores prior decisions by this Court which establish that a district court's dismissal of a federal claim under Rule 12(b)(6) is a final judgment on the merits entitled to res judicata effect in both federal and state courts. *See Moitie*, 452 U.S at 399 n.3, 402 (dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits entitled to claim-preclusive effect); *Stoll*, 305 U.S. at 170-71 (where a judgment of a federal court determines a right under a federal statute, that decision is "final until reversed in an appellate court, or modified or set aside in the court of its rendition.") (quoting *Deposit Bank v. Frankfort*, 191 U.S., 499, 520 (1903)). The Ninth Circuit's observation that the district court's judgment dismissing Wagh's RICO claims with prejudice must be given claim-preclusive effect in the California state courts is entirely consistent with these controlling precedents.

In *Moitie*, the district court dismissed antitrust claims on res judicata grounds because that same court had previously dismissed substantially identical claims asserted by the same plaintiffs. 452 U.S. at 403. Although the Ninth Circuit concluded that res judicata should not apply because the earlier dismissal had "rested on a case that has been effectively overruled," this Court reversed, noting:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment

> may have been wrong or rested on a legal principle subsequently overruled in another case.

Id. at 398 (citations omitted). This Court held in *Moitie* that a "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits'" and held that the district court's judgment of dismissal from the earlier case was res judicata as to plaintiff's federal law claims. *Id.* at 399 n.3, 402.[1] Here, consistent with *Moitie*, the Ninth Circuit correctly noted that the dismissal with prejudice of Wagh's RICO claims under Rule 12(b)(6) bars Wagh from relitigating those claims.

These established res judicata principles were not altered by this Court's decision in *Semtek*, as Wagh implicitly suggests. *Semtek* acknowledged the difference between the preclusive effect of a federal court's judgment on an issue of federal law, and the preclusive effect to be afforded a diversity court's judgment on an issue of state law. 531 U.S. at 506-08. With respect to judgments based on federal law, like the judgment at issue here, *Semtek* observed that this Court has "long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes."

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1. Circuit courts have routinely followed *Moitie* in holding that the dismissal of federal claims under Federal Rule of Civil Procedure 12(b)(6) is entitled to claim-preclusive effect. *See, e.g., Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002) (affirming dismissal of ERISA claims as precluded by prior Rule 12(b)(6) dismissal); *Cannon v. Loyola University of Chicago*, 784 F.2d 777, 780, 782 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) (affirming dismissal of Title IX claims as precluded by prior Rule 12(b)(6) dismissal; Rule 11 sanctions affirmed because plaintiff's claim was "barred by well established principles of res judicata").

Id. at 507 (citing *Stoll*, 305 U.S. at 171-72; *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 290-91 (1906); *Frankfort*, 191 U.S. at 514-15). In fact, *Semtek* cites *Moitie* as one of this Court's leading "cases recognizing the claim-preclusive effect of federal judgments in federal-question cases," *id.* at 504-05, and *Semtek* did not question the holding of *Moitie* that a Rule 12(b)(6) dismissal "is res judicata as to respondents' federal-law claims." *Moitie*, 452 U.S. at 402.

Wagh relies upon a passage from *Semtek* (Pet. 8-9) which notes that a judgment "on the merits" is not necessarily a judgment entitled to claim-preclusive effect. 531 U.S. at 503. But this Court made that statement in the context of explaining that not every dismissal under Rule 41(b) of the Federal Rules of Procedure is entitled to claim-preclusive effect. *See id.* at 501-04. Wagh also relies upon the observation in *Semtek* that the district court's order expressly dismissing a case with prejudice is "a necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts." *Id.* at 506. That statement was made to explain the rule governing the claim-preclusive effect of a federal court's dismissal of a state law claim on statute-of-limitations grounds. 531 U.S. at 506-09. *Semtek* did not disturb or question the holding of *Moitie* that a dismissal with prejudice of a federal law claim under Rule 12(b)(6) is an adjudication on the merits entitled to claim-preclusive effect.

Wagh suggests the Ninth Circuit did not refer to *Semtek* in its amended opinion because it could not distinguish *Semtek*. Pet. 10. It is more reasonable to conclude that the Ninth Circuit simply realized that its reference to *Semtek* was unnecessary. In any event, there is no conflict, "in principle" or otherwise, between the decision of the Ninth Circuit and this Court's decision in *Semtek*. Accordingly, the petition should be denied.

2. The Ninth Circuit's Opinion In This Case Does Not Conflict With Its Earlier Decision In *Zhang*

Wagh urges this Court to grant his petition because the decision of the Ninth Circuit in this case allegedly conflicts with the Ninth Circuit's earlier opinion in *Zhang v. Dept. of Labor & Immigration*, 331 F.3d 1117 (9th Cir. 2003). The alleged existence of an intra-circuit conflict is not a valid grounds for seeking review under Rule 10 of the Rules of this Court. *See also Davis v. United States*, 417 U.S. 333, 340 (1974).

There is no conflict between the present case and *Zhang*. Unlike this case, *Zhang* examined whether the district court had properly dismissed a plaintiff's commonwealth claims based upon a ruling by the Supreme Court of the Northern Mariana Islands which barred those claims on statute of limitations grounds. *Zhang*, 331 F.3d at 1118. The Ninth Circuit reversed the dismissal, noting that the plaintiff had timely filed her commonwealth claims in federal court, and concluding that it would be unfair to prevent plaintiff from litigating those claims in federal court simply because they had not been timely filed in the commonwealth court. *Id.* at 1119.

Here, by contrast, the Ninth Circuit held that Wagh's federal law claims under RICO were properly dismissed with prejudice by the district court for failure to allege facts sufficient to constitute a cause of action. App. at 11-18. The Ninth Circuit then correctly observed that res judicata would bar Wagh from reasserting his RICO claims in state

court. *Id.* at 18-19. The holding in *Zhang* is completely inapposite and does not conflict with the Ninth Circuit's opinion below.

Contrary to Wagh's assertion (Pet. 5, 9), there is nothing "unfair" about the Ninth Circuit's opinion in this case. Although in *Zhang* the court noted that it would be "unfair" to apply res judicata principles to the commonwealth claims, 331 F.3d at 1119, there is no generally applicable "unfairness" exception to the doctrine of res judicata, as Wagh suggests. *See Moitie*, 452 U.S. at 401 (the doctrine of res judicata serves "vital public interests" beyond the individual equities of a particular case: "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.") (citations and internal quotation marks omitted).

3. The Ninth Circuit's Opinion Does Not Conflict With *Erie*

Wagh asserts (Pet. 4-5) that the Ninth Circuit's observations about the res judicata effect of the dismissal will somehow result "in the very forum shopping and inequitable administration of the laws which this Court sought to avoid by its decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)." But Wagh makes no attempt to explain how this Court's decision in *Erie*, which held that federal courts have no power to declare substantive rules of federal common law applicable to state law claims, could bear on this federal question case. *See Erie*, 304 U.S. at 78;

see also Chambers v. NASCO, Inc., 501 U.S. 32, 53 (1991) ("*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court."). Nothing in *Erie* would authorize a litigant to continue to pursue federal claims in state court after those claims have been finally adjudicated by a federal court.

Wagh apparently believes that the California state court might have applied a more lenient pleading standard to his RICO claims if those claims had remained in state court. Pet. 3-4, 11-12. Whether Wagh is right or wrong on this issue, it is irrelevant. The RICO claims were properly removed to the district court, and that court entered a final judgment on them. App. 11-18. A writ of certiorari should not be granted based upon Wagh's speculation that the Ninth Circuit's observation about the claim-preclusive effect of the dismissal in this case might encourage other defendants to exercise their right to remove other actions.[2]

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2. Wagh incorrectly suggests that *Cartt v. Superior Court*, 50 Cal. App. 3d 960, 969 n.15 (1975), provides direct support for his statement that

> if, following removal, a district court were to dismiss a plaintiff's RICO counts without prejudice because of the plaintiff's failure to state a federal claim, and then were to remand to the state court, 'only an extraordinarily wealthy, quixotic, and masochistic [defendant] would undertake such a fruitless endeavor' as to remove that same claim again.

(Pet. 11) (bracketed insertion by Wagh). The foregoing excerpt from *Cartt* did not involve a defendant's right to remove a federal question case, or remand of such a case following a dismissal without prejudice. It dealt with the "remote theoretical possibility" that an absent class member might attempt to relitigate issues previously resolved in favor of a class action defendant. *See Cartt*, 50 Cal. App. 3d at 969 n.15.

Finally, the Ninth Circuit did not "recommend" that Wagh should have dismissed his RICO claims without prejudice in order to avoid the res judicata bar – it simply observed that Wagh had failed to do so. App. 19. Wagh's speculative arguments about why such a dismissal "stratagem" might not work for him or other litigants are irrelevant. Pet. 10-12.

CONCLUSION

For each of the foregoing reasons, the respondents respectfully request that this Court deny the petition.

Respectfully submitted,

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